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No. 638-640

IN THE

Supreme Court of the United States

October Term, 1943.

THE WEST LAUREL HILL CEMETERY COMPANY,
Petitioner,

vs.

W. J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT (Nos. 8111, 8112, 8113, October Term, 1942) AND BRIEF.

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143878

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No.

THE WEST LAUREL HILL CEMETERY COMPANY,
Petitioner,

vs.

W. J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF.

THE WEST LAUREL HILL CEMETERY COMPANY, by its attorney, Paul Reilly, prays that a writ of certiorari issue to review the judgments of the United States Circuit Court of Appeals entered November 19, 1943, (Nos. 8111, 8112, 8113, October Term, 1942) affirming the judgments of the United States District Court for the Eastern District of Pennsylvania, (Civil Action, Nos. 278, 279, 280).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered the 19th of November, 1943.

The jurisdiction of this Court is defined by *Section* 240 (*a*) *of the Judicial Code* (*U.S.C.A. Title* 28, *Judicial Code &c. sec.* 347, *p.* 359), *Act of* 13*th of Feb.* 1925, *c.* 229, *Sec.* 1, 43 *Stat.* 938.

QUESTIONS PRESENTED.

Petitioner sued to recover Capital Stock Taxes paid for the years, *1933* and *1934* and *1935*. The facts were stipulated.

(1) Is the petitioner exempt from the corporation capital stock tax involved herein under the Internal Revenue Laws, for the reasons:

(a) The petitioner is owned and operated exclusively for the benefit of its members who are burial right owners; and

(b) The petitioner is not operated for profit;

(c) The petitioner is chartered solely for burial purposes, and is not permitted by its charter to engage in any business not necessarily incident to that purpose, and no part of the net income inures to the benefit of any private shareholder or individual?

(The Court below ruled petitioner was not exempt, hence answered these questions negatively.)

(2) The petitioner has done nothing to deprive it of such exemption.

(These matters give rise to comment on incidental questions, whether or not specifically referred to in the opinion of the lower Court.)

(3) The Circuit Court of Appeals erred in affirming the judgment of the District Court.

OPINION BELOW.

The case in the Circuit Court of Appeals was argued before Biggs, Maris, and Jones, J. J., December 23, 1942.

The opinion in the Court below, which is not yet reported, was filed November 19, 1943, is as follows:

Before BIGGS, MARIS and JONES, *Circuit Judges.*

JONES, *Circuit Judge.*

The question here involved is whether the plaintiff taxpayer is entitled to claim exemption, as a cemetery company, from liability for capital stock taxes for the years 1933, 1934 and 1935. The taxpayer, after disallowance of its claims for refund, filed three separate suits in the District Court against the collector to recover the disputed taxes which it had been compelled to pay for each of the respective years mentioned. The cases were consolidated for trial and came before the court below on motions by the respective parties for summary judgments on the pleadings supported by a stipulation of facts. From the judgments entered by the trial court in favor of the defendant collector, the plaintiff took the pending appeals.

The statutes pertinent to the plaintiff's claims are Sec. 215 (c) (1) of the National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195, Sec. 103 (5) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and the cognate provisions (Sec. 701 (c) (1) and Sec. 101 (5)) of the Revenue Act of 1934, c. 277, 48 Stat. 680.

Sec. 215 of the National Industrial Recovery Act, which imposed a capital stock tax on domestic corporations for each year ending June 30, provided in subsection (c) (1) thereof that,—

> "(c) The taxes imposed by this section shall not apply—

"(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;"

Sec. 103 of the Revenue Act of 1932 granted exemption to certain organizations from the income tax liability imposed by that Act upon corporations, among such exempted organizations being,—

"(5) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which enures to the benefit of any private shareholder or individual;"

By Sec. 701 (a) of the Revenue Act of 1934 a capital stock tax at the same rate as had been imposed by Sec. 215 (a) of the National Industrial Recovery Act was imposed on domestic corporations for each year ending June 30, beginning with the year ending June 30, 1934, and Sec. 701 (c) (1) of the Act of 1934 provided that,—

"(c) The taxes imposed by this section shall not apply—(1) to any corporation enumerated in section 101;"

Among the corporations enumerated in Sec. 101 of the Revenue Act of 1934 (see subsection (5)) were cemetery companies supplying qualifications similar to those specified in Sec. 103 (5) of the Revenue Act of 1932 as above quoted.

The question which we have for consideration is whether the court below erred in concluding that the instant taxpayer did not qualify during the years in question as a cemetery company within the intent of Sec. 103 (5) of the Revenue Act of 1932 or the similar provision in Sec. 101 (5) of the Revenue Act of 1934. As the two provisions are

exactly alike, what we have to say with reference to the one is equally applicable to the other.

The plaintiff company was incorporated on November 9, 1869, under the laws of Pennsylvania. On October 20, 1869, John J. Smith, acting as the representative of a group who proposed to form the taxpayer corporation, acquired in his own name for the sum of $53,032.50 a tract of land of 88.5 acres which it was agreed would be conveyed to the taxpayer company. On November 16, 1869, Smith and his wife executed, acknowledged and delivered to the company a deed of the land in fee. Attached to the deed is a writing showing receipt of $53,032.50 by Smith and his wife in full of the consideration for the conveyance. The money paid to acquire the land had been advanced by the group of proposed incorporators for which they were to receive credit on their respective subscriptions to the company's capital stock when the land was conveyed to it. On the "day book" opened by the company there appears the following entry: "Land Account dr. to John Jay Smith for 88-3875/10000 Acres purchased of him at $600 per acre—$53,032.50." It also appears from entries in the company's books that the sum shown as due Smith for the land was applied against his purchase of $75,000 par value of the company's stock. All told, the company's capital stock consisted of 3000 shares $50 par, all of which appear to have been subscribed for and for which stock certificates were issued. However, only $112,500 was actually paid in on account of the stock subscriptions. Additional lands were purchased by the company up to 1926, at which time it had a total of 150.9 acres.

At a special meeting of the board of managers of the company on November 21, 1881, one of the managers submitted, and the board approved, "the following report as a Declaration of the Trusts under which the Cemetery Company holds its lands:—" etc.[1] The so-called declaration of

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[1] Minutes of the West Laurel Hill Cemetery Company, Philadelphia, Pa., Exhibit No. 6, Appendix, p. 60a.

trust acknowledged, inter alia, that the company held the lands whereof it was seized in trust (1) "for the purpose of a Cemetery or place of interment or burial, under and subject to the provisions of the Charter and By-Laws, [etc.] * * * " of the company; (2) for the purpose of conveying at fixed prices to purchasers rights of interment and to the exclusive use, possession and enjoyment of lots purchased, the company to set apart and invest "ten per centum of all purchase monies [so] received as and for a PERMANENT FUND, the principal of which shall not be diminished, the annual interest and income of which shall be applied for the preservation forever of the Cemetery premises aforesaid in good order and repair"; and (3) "to apply and appropriate out of the remainder of said purchase monies * * * received from said sales, and from any other uses of said Cemetery premises, * * *" (a) "to the current repair and proper care and improvement of said premises, and * * * to set apart a portion thereof [i.e. the residue of income from sales] not exceeding ten per cent for the formation of a contingent fund for the purchase of additional land or other useful or necessary purposes incident to said Cemetery, * * * " and (b) "to apply, appropriate and divide the annual net income and monies from time to time received from said sales, not required for the aforesaid purposes, to and among the contributors * * * in proportion to their respective interests and shares * * * for which they shall hold certificates to be issued by the said Company", the whole thereof consisting of 3000 equal parts or shares transferable only upon the books of the company, the net income so distributable by the company to be "the consideration for the conveyance of the said premises to the said Company for the aforesaid purposes."

The trust declaration further provided that the persons name as corporators in the charter of the company should be deemed stockholders in the company and entitled to one vote each and that the holders of the certificates under the trust declaration should "have all the rights and privileges

of Stockholders in the said Company with a vote for each share represented by the aforesaid Certificates respectively, and eligible as Managers of said Company."

A resolution was thereupon adopted by the board of managers which provided that "the contributions subscribed for the aforesaid purpose shall hereafter be considered and treated as fully paid up, and * * * upon the surrender of the present certificates for cancellation, new certificates shall be issued" in the form thereby prescribed.[2]

At the annual meeting of the stockholders of the company held the same day (November 21, 1881) a resolution was unanimously adopted approving the declaration of trust and the resolution declaring the contribution fund fully paid, as passed at the meeting of the board.

From 1875 to 1881 inclusive the plaintiff company distributed to its stockholders, and from 1881 up to the present time to the owners of its certificates issued pursuant to the resolution of November 21, 1881, dividends or distributions out of earnings or profits in proportion to their respective holdings of the shares of stock or certificates issued to them by the company. From 1875 to and including 1881 the distributions to shareholders aggregated $27,000, or a yearly average of $3,857.14 plus. From 1882 to the close of the year 1912 the aggregate sum so distributed to the certificate holders was $753,000, for a yearly average of $24,290.32 plus. And from 1913 to the close of the year 1931 the aggregate sum so distributed was $1,263,000, for a yearly aver-

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[2] The form of the certificates as prescribed by the resolution of November 21, 1881, is as follows,—

"WHOLE NO. OF SHARES 3,000

"THE WEST LAUREL HILL CEMETERY COMPANY

"THIS CERTIFIES that is entitled to parts or shares in THE WEST LAUREL HILL CEMETERY, under the trusts declared by THE WEST LAUREL HILL CEMETERY COMPANY, Transferable only on the books of said Company, in person or by attorney on surrender of this Certificate.

"IN TESTIMONY WHEREOF, The West Laurel Hill Cemetery Company have caused this certificate to be signed by their President and countersigned by their Treasurer,

this day of A. D. 18

Treasurer President"

age of $66,473.68 plus. Sometimes these payments of net earnings to the share or certificate holders were designated on the books of the company as "dividends" and sometimes as "distributions". Notwithstanding the company's distribution of net income, as above stated, its undistributed earnings continued to increase so that, with the close of the year 1931, it had an accumulated earned surplus of more than $1,400,000.

As a reading of Sec. 103 (5) discloses, the exemptions thereby conferred extend to cemetery companies (1) "owned and operated exclusively for the benefit of their members", (2) "not operated for profit" and (3) "chartered solely for burial purposes as a cemetery corporation and not permitted by * * * charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which enures to the benefit of any private shareholder or individual." It has been said that the foregoing requisites are mutually independent and that a company which fulfills any one of the three requirements is entitled to exemption. Commissioner v. Kensico Cemetery, 96 F. 2d 594, 596 (C.C.A. 2). And Art. 526 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, so recognizes.[3]

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[3] Treasury Regulations 77, Art. 526, reads as follows:

"Art. 526. *Cemetery companies.*—A cemetery company may be entitled to exemption—

"(1) If it is owned by and operated exclusively for the benefit of its lot owners, or

"(2) If it is not operated for profit.

"Any cemetery corporation chartered solely for burial purposes and not permitted by its charter to engage in any business not necessarily incident to that purpose, is exempt from income tax, provided that no part of its net earnings inures to the benefit of any private shareholder or individual. A cemetery company which fulfills the other requirements of the Act may be exempt, even though it issues preferred stock entitling the holders to dividends at a fixed rate, provided that its articles of incorporation require—

"(1) That the preferred stock shall be retired at par as soon as sufficient funds are realized from sales, and

"(2) That all funds not required for the payment of dividends upon or for the retirement of preferred stock shall be used by the company for the care and improvement of the cemetery property."

The taxpayer contends that it qualifies for exemption within each of the three situations specified by the pertinent sections in the Revenue Acts. The court below concluded,[4] and we think the evidence abundantly supports the conclusion, that the taxpayer fails to fulfill the requirements of any of the prescribed conditions.

The company was not owned and operated exclusively for the benefit of its members if members be taken to mean, as we think the Revenue Acts intend, the owners of lots or burial rights in the cemetery. Here, the owners of lots or burial rights have neither had nor have any voice in the management or operation of the company's affairs. They are not entitled to participate in, nor have they ever received, any "dividends" or "distributions" from the earnings of the company. At most they are nothing more than patrons of the sepultural facilities which the cemetery furnishes. The owners of the company's certificates, to whose large material benefit the cemetery has been operated over the years, are not the members contemplated by the exemption provisions, found in the Revenue Acts, with respect to cemetery companies.

The taxpayer corporation has been operated for profit. A glance at its financial history leaves no doubt of that. With its relatively small originally contributed capital and with additional lands purchased from earnings, it distributed from 1875 to 1931 to the holders of 3,000 shares or certificates of $50 par each (all of which were subscribed

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The exception conceded by the above Regulation where a cemetery company which otherwise fulfills the requirements of the Act has issued preferred stock entitling the holders thereof to dividends at a fixed rate is not presently material. Not only has the instant taxpayer not issued preferred stock with a fixed dividend rate but such an issue, where present, must meet certain conditions, both as to the stock's retirement and as to the use of the funds realized from sales, which are not met by the stock or certificates which the taxpayer issued.

[4] The opinion below was filed in the case of West Laurel Hill Cemetery Co. v. McLaughlin, former Collector, and Same v. Ladner, Collector, 44 F. Supp. 63, where the taxpayer's right to exemption from income tax liability under a provision as to cemetery companies in the Revenue Act of 1928 was involved.

but not fully paid for) a grand total of $2,043,000 for an average annual dividend for the period of time involved of $12 plus per share or certificate. At the same time it accumulated an undistributed earned surplus of $1,400,000. The appellant cites and relies upon Trinidad v. Sagrada Orden, etc., 263 U. S. 578, 581, where the Supreme Court said that,—"Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." In the Sagrada case, which involved a claim by a taxpayer to exemption as a corporation "organized and operated exclusively for religious, charitable, * * * or educational purposes" etc., no individual had a personal interest in or pecuniarily benefited from the operation of the company. True enough, the fact that a cemetery company operates at a profit does not *ipso facto* deprive it of its right to exemption. But if it has earnings and desires to maintain an exemption status, it must use all such income exclusively for the promotion and maintenance of the cemetery purposes for which it was created. Manifestly the instant taxpayer has not done that.

Finally, while the taxpayer was chartered solely for burial purposes as a cemetery company and was not permitted by its charter to engage in any business not necessarily incident to that purpose, it can hardly be said that its net earnings did not enure to the benefit of any private shareholder or individual. We have already pointed out the large gain the certificate holders have derived from the operations of the cemetery. The appellant urges, however, that since 1881 the distributions made to certificate holders have been in repayment of the contributors' original outlay for the land conveyed to the company. It bases this contention on the provision in the so-called declaration of trust that the distributions to certificate holders should be "the consideration for the conveyance of the said premises to the said Company." But that provision is wholly incapable of creating a condition contrary to the fact. The land had long

since been paid for. The books of the company so indicate. Nor did the distributions bear any relation to the discharge of a liability for the cost of the land, nor were they on the basis of a fixed percentage of the sale prices of the lots. The distributions to the certificate holders have come from the commingled surplus earnings of the company after payment of all operational expenses and after setting over to the permanent fund ten per cent of the residual earnings and a discretionary amount not to exceed ten per cent to the contingent fund. The appellant concedes that the "organization was somewhat muddled insofar as the legal situation was concerned" but argues that "this muddling was cured in 1881" by the declaration of trust. The fact is that the corporation was operated after the declaration of trust, just as before, for the pecuniary advantage of the company's certificate or share holders. There was no change whatsoever so far as material benefit of the individual certificate holders was concerned.

In Smith v. Commissioner, 69 F. 2d 911, this court held one of the taxpayer's certificate holders liable to return as taxable income a distribution received by her from the cemetery company in 1929. The particular certificate holder claimed that the distribution was a deferred payment for the sale of the land to the cemetery company and therefore not a dividend as defined in Sec. 115 of the Revenue Act of 1928. While the cemetery company's right to exemption was not involved in that case, nor was the company a party to or represented in the proceeding, the ruling that the payments by the company to its certificate holders were distributions of earnings from operations and not returns for advancements of capital was germane to the decision. Under the facts here present, there is no valid reason for holding any differently in the instant case where the cemetery company's rights are directly in issue.

The cases cited by the appellant are not in point. In Commissioner v. Kensico Cemetery, cited supra, a cemetery company, as authorized by a New York statute, acquired

lands for burial purposes by agreeing to pay as the purchase price one-half of the proceeds from the sale of burial lots plotted from the land. The Court of Appeals held that the certificates issued by the cemetery company to the grantors in payment for the land were in reality only certificates of indebtedness entitling the holders thereof to share in one-half of the proceeds from the sale of burial lots if and when such sales were made. That is not this case. In Forest Lawn Memorial Park Association, Inc. v. Commissioner, 45 B.T.A. 1091, the petitioner, a non-profit organization, was incorporated for the purpose of "operating and managing memorial park cemeteries" and, for that purpose, was authorized to acquire and sell lands and do "all things necessary for, incident to, or convenient in the interring of the human dead." The by-laws of the company required the accumulation of net profits or their use for the improvement of the property or the benefit of the Association. The earnings could not be distributed to any individual or corporation. The Board of Tax Appeals held the petitioner to be a cemetery company exempt from taxation under the Revenue Acts because it served the predominant purpose of its incorporation and used any net profits derived from its activities for the advancement of its corporate purpose, no part of its net earnings enuring to the benefit of any private individual or shareholder.

The several judgments appealed from are affirmed.

THE STATUTES INVOLVED.

The statutes applicable to this case are, because the issues of exemption or no exemption apply to each of the consolidated cases, the following:

(The letters in the lefthand column, outside quotations, and in parentheses, in the statutes cited below, are supplied for analysis to conform to the argument hereafter made.)

REVENUE ACT OF 1928—"SEC. 103. The following organizations shall be exempt from taxation under this title * * *"

(5) Cemetery companies

I. (a) "owned and operated exclusively for the benefit of their members, or

II. (b) "which are not operated for profit; and

III. (c) "any corporation

(d) "chartered solely for burial purposes as a cemetery corporation, and

(e) "not permitted by its charter to engage in any business not necessarily incident to that purpose, and

(f) "no part of the net earnings of which inures to the benefit of any private shareholder or individual."

(*U. S. C. A. Title* 26, *Int. Rev. Acts* 1924 *to date p.* 373, *May* 28, 1928, *C.* 852, 45 *Stat.* 791-883)

The same wording as that quoted above (from the Revenue Act of 1928) is found in *Section* 103 (5) *of the Revenue Act of* 1932, *U. S. C. A. Title* 26, *Supra, p.* 506, *Act June* 6, 1932, *C.* 209, 47 *Stat.* 169-289, *and Section* 101 (5) *of the Revenue Act of* 1934, *U. S. C. A. Title* 26, *Supra,* 688, *Act of May* 10, 1934, *C.* 277, 48 *Stat.* 680-772, *and Section* 101 (5)

of the Revenue Act of 1936, *U. S. C. A. Title* 26, *p.* 849, *Act June* 22, 1936, *C.* 690, 49 *Stat.* 1648-1756.

The statutory requirement for the application for exemption has been complied with as to all the years involved in these cases. (Ap. 36a.)

The statutes, assessing Capital Stock Taxes, exempt from liability for that tax the same corporations exempt under the then current corporation income tax law. See: *National Recovery Act of* 1933, *Sec.* 215, *C.* 90, 48 *Stat.* 195-207, *and Revenue Act of* 1934, *Sec.* 701, *U. S. C. A. Title* 26, *Supra, p.* 787, *Act May* 10, 1934, *C.* 277, 48 *Stat.* 680-772, *and Revenue Act of* 1935, *Sec.* 105, *U. S. C. A. Title* 26, *Supra, p.* 796, *Act August* 30, 1935, *C.* 829, 49 *Stat.* 1014-1028; *and the Revenue Act of* 1936, *supra, only changes the rate of tax.*

STATEMENT.

The cases on appeal concern Federal Corporation capital stock taxes, for the years 1933, 1934, and 1935.

The issues under the pleadings are made up as follows:

(a) Is the petitioner exempt from the taxes involved,

(b) All other questions are eliminated by the pleadings, that is to say, it is admitted that:

The Commissioner of Internal Revenue caused to be assessed the taxes in question, refusing the petitioner's petition for exemption, and the petitioner, under protest, paid the taxes to the defendant, and filed timely claims for refund and the said claims were refused, and petitioner sued the defendant to recover the taxes (See Complaints, Appendix pp. 2a, 6a, 11a, and Answers, Appendix pp. 15a, 17a, 20a, respectively).

From 1809 to 1881.

The petitioner is a cemetery company chartered in 1869, under the laws of Pennsylvania (referred to at p. 2 of the brief filed herewith and Appendix pp. 27a, 46a). The purpose of the corporation is stated in its charter to be, in the preamble, the association is for the purpose "of establishing a cemetery" (Ap. 49a) and the premises "shall be used for purposes of burial" (Ap. 49a) and Article II, "the corporation shall be capable to purchase and hold for the purposes of a cemetery said tract" &c. (Ap. 49a).

The associates forming the petitioner cemetery association put up, or agreed to put up, money to finance the proj-

ect, and with moneys so acquired, bought the land, or cemetery premises (Ap. 27a).

Then, after the charter was granted, which did not provide for capital, capital stock, nor stock holding, although it did refer to "stockholders" at one place (Ap. 50a) evidently meaning the associates, the original Managers named in the charter proceeded to create an unauthorized capital structure, with a capital in an amount they decided upon, divided into shares, which were issued to the underwriters (Ap. 28a and 58a).

This so-called stock issue was for 3000 shares at $50. par, in all, $150,000. (Ap. 28a, and 51a).

The stock was issued, only partly paid for, with the right to call the balance underwritten (Ap. 28a, 51a).

The known facts, at this day, about the "payment" for the tract of land are found in the stipulation (Ap. 27a) Par. 1 and Par. 2 and (Ap. 28a) Par. 5, and in the Exhibits No. 1 (Ap. 38a) where the land is referred to in the "Day Book" entries, and Exhibit No. 4 (Ap. 53a) where the deed is found. Petitioner's conclusion from these facts and exhibits is that they mean that the unauthorized stock was issued for, inter alia, the land, and additional cash, and not that cash was contributed to Smith, who bought the land, and paid for it, and conveyed the land to petitioner who paid him for the land in cash. In other words, when the land was conveyed to petitioner November 16, 1869 and unauthorized stock issued, the book entries of preliminary transactions or later entries did not show a cash payment for land by petitioner but the said stock was issued at that time for land and cash.

This plan of action was not that in contemplation when the unterwriting took place, because it had been in contemplation that the "purchase money" "of the land" and the "monies required for the necessary improvements to adapt the same for the purposes of a Cemetery" had "been advanced and contributed in certain proportions by certain persons" (the associates) "who associated themselves to-

gether for that purpose, and who in order conveniently to effect the same, caused the conveyance of the said premises to be made to the company, which agreed to hold the same in Trust for the use, intents, and purposes for which the moneys were advanced" (Ap. 61a).

The type of organization was somewhat muddled insofar as the legal situation was concerned, inasmuch as the underwriters apparently considered stock, after the charter was granted, although it was not the type of charter for a stock company, but, on the other hand, was a type of charter conformable to the statute for a cemetery association.

However, this muddling of the organization was cured in 1881.

From 1881 On.

At that time the corporation was reverted to the type its charter authorized, and the petitioner became a true cemetery association, with its cemetery premises still not paid for, and an obligation outstanding to pay for the cemetery premises. This was embodied in the trust resolution of November 21, 1881 (Ap. 60a, &c.).

In setting forth the above statement, the attention of this Court is called to this situation—the *facts stipulated* are briefly stated, and this is done without regard to the materiality, competency or relevancy of the facts.

The relevent, competent and material facts are these:

Since 1881 petitioner, an incorporated cemetery association without capital, capital stock, or stockholders, has paid a part or portion of the sums it received for sales of burial rights in its cemetery, to designated persons, as consideration for the conveyance to it of the cemetery premises, and has accumulated in the investment in the cemetery a large valuation, in which the designated persons receiving the part or portion of the proceeds of sales of burial rights have not any right or interest.

All other facts stipulated are, while true, merely historical, collateral, incidental, explanatory, or opinions or views of events which have transpired.

At that time, in 1881, the former issue of capital stock, and stock certificates, was surrendered and cancelled, and ended (Ap. 29a and 63a).

The consideration given for the cancellation of the stock was the payment for the cemetery premises to be made under the trust to the shareholders in the trust, who were the original contributors or their successors (Ap. 29a, 62a).

The agreed upon facts and undertakings, in the trust resolution of 1881, carried out, ratified, and approved, by the cancellation of the stock, and the issuance of shares in the trust of 1881 were:

(a) The recital that the lands were conveyed to the petitioner on the trusts set forth (See preamble, Exhibit No. 6, Ap. 61a).

(b) The trust is declared to be to use the premises "for the purposes of a cemetery or place of interment, or burial" "under the charter", &c. (Ap. 61a).

(c) To grant burial rights for prices to be fixed (Ap. 61a) and from the proceeds of same:

(d) To pay:

I. 10% to a Permanent Fund, principal to be undiminished, and income applied for preservation forever of the Cemetery premises in good order and repair (Ap. 61a).

II. To apply proceeds of sales of said burial rights and other uses of the cemetery to current repair and proper care and improvement of the premises (Ap. 62a).

III. To set apart not exceeding 10% thereof for for-

mation of a Contingent Fund for purchase of additional land, and other purposes incident to the cemetery (Ap. 62a).

IV. To apply the annual net income received from said sales (of burial rights) to and among contributors (associates above referred to) as they shall hold certificates of which there shall be 3000 shares "which said income out of said sales to be paid" • • • "is the consideration for the conveyance of the premises to the Company for the aforesaid purposes." (Ap. 62a).

The difference between the situation of the prior stockholders and the new shareholders was very marked, inter alia,

Stockholders	*Shareholders in Trust*
Participated	Participated only in
I. in all business done by the petitioner.	I. the proceeds of sales of burial rights.
II. Were to be paid dividends on stock from profits.	II. Were to be paid consideration for conveyance of the cemetery premises.
	III. Were to be paid whether a profit was made or not.

The "Corporators" in the charter were to be deemed stockholders, and in case of death there was to be elected by the survivors a lot-holder in his place who is not a trust shareholder (Ap. 62a).

The trust shareholders are given rights of stockholders, that is, a vote for each share and shall be eligible as Managers (the same as Directors in ordinary nomenclature) (Ap. 62a).

The trust shareholders' interests ended when all the burial rights were sold. They were then paid in full.

The petitioner had the burial rights in the land, and the

improvements thereon, to sell, among other sources of income (Ap. 32a). It had to pay for that land, the cemetery premises, (Ap. 62a) to the shareholders under the trust, just exactly as a furniture dealer must pay for his wood, a steel maker for his ore, or any producer for his raw material.

What might have once been full payment for the cemetery premises, the capital stock, was cancelled, and the premises were not paid for when that consideration was cancelled, but, after 1881, the raw material, the premises, were to be paid for, out of sales of burial rights.

The revamped and reconstructed organization continued in this way from 1881 to 1913, and thereafter to date.

Payments were made to shareholders in the trust of 1881, called by divers names, sometimes with Managers' action, sometimes without (Ap. 29a).

After 1913, when the income tax law went into effect, the question of taxes under that law was constantly before the petitioner, and evidently taxes assessed were in nowise burdensome and were paid.

After the taxes for 1933 had been paid, a new basis for tax was put into effect by the Commissioner.

The Commissioner's action went back to cover the year 1930.

For 1930 an income tax deficiency was assessed which is the subject of one of the suits consolidated below. Petitioner could not because of bar of the statutory period, claim for anything, but the deficiency assessed and paid by it for 1930.

For 1931, a deficiency was assessed, and petitioner had time to sue for all the tax paid, primarily, and for the deficiency later assessed, and for this year it filed amended returns, claiming that there was an overpayment, in this year, as well as and in addition to the deficiency assessment.

For 1932, 1933, 1934, and 1935, there were only deficiency assessments.

By its various actions, petitions and claims, the petitioner

claimed its exemption under the statutes (Ap. 36a), but on refusal of exemption paid the taxes, and the petitioner made refund claims, which were denied. (Pleadings, Ap. pp. 2a to 23a.)

Hence suits were brought to recover the taxes.

The suits brought included those in the Court below, now here on appeal, for the capital stock taxes for 1933, 1934, and 1935.

These instant cases were selected for preliminary disposal because they were complicated with no other issue than that of exemption.

Upon the stipulated facts, the cases were to be submitted in the Court below, on motions, by each party, for a summary judgment. Through inadvertence the defendant's motions were filed and the case submitted to Judge Bard, without argument, and without petitioner's knowledge on May 4, 1942, and he forthwith gave judgment (Ap. 1a, 192a) disregarding the ten days provided for in *R. C. P.* 56 (*c*); then petitioner's motions were filed (Ap. 1a, 25a) on May 6, 1942, and Judge Bard opened the judgment so entered (Ap. 193a) on May 8, 1942. The cases were then submitted to Judge Kalodner, who gave judgment for defendant (Ap. 194a and 195a), following an opinion by Judge Moore (Ap. 183a, 192a). That opinion was rendered in a case, between the same parties, on the same stipulation, relating to income tax for 1931, but gave no definitive judgment, as there were other questions involved.

The final judgments entered in the District Court were appealed, to the United States Circuit Court of Appeals for the Third Circuit, and the judgments were affirmed.

There were no issues of fact requiring decision. The Circuit Court, however, in arriving at its conclusion does not refer to all the relevent facts, but considers some only, and ignores in coming to that conclusion the chronology of events.

REASONS FOR GRANTING THE WRIT.

I. The present judgment conflicts with the determination of the United States Circuit Court for the second district, *Commissioner v. Kensico Cemetery*, 96 F (2) 2, 594 (1938) (C.C.A. 2) which decides that payment to individuals of a share of proceeds of sales of burial rights, in the land owned as a cemetery, does not deprive the cemetery company of its rights of exemption under the Internal Revenue Laws.

The present case concludes the contrary. The only ground that can be inferred from the Opinion of the Circuit Court for denying petitioner exemption, like that given Kensico Cemetery, is that petitioner paid for the land used for cemetery purposes to the illegally created stockholders, and to ignore the trust of 1881, and the facts on which it is based.

II. The present judgment conflicts with the principle of the case of *Trinidad v. Sagrada*, 263 U. S. 578, 68 L. Ed. 488, S. C. Rep. 578, which determines that the making of a profit by a non-profit corporation, for its own use, does not avoid the statutory exemption.

The Circuit Court of Appeals in the instant cases stresses as basis for its decision the fact that the petitioner has paid for its own use as consideration for the land large sums of money, called a "grand total" over fifty-six years, and has accumulated a large surplus in the same time (this petition, p. viii, opinion of the Court).

III. There has been no decision of this Court construing the provisions of the statutes involved in relation to cemetery companies.

The reasons are important because above all other re-

quirements, each community requires cemetery accommodations, one or more, depending on the size of the community, and hence the explicit decision of the cases reaches into every place in the country, viz., may a burial place be arranged for, under a plan, that the contributors of the land used for that purpose, as burial plots are sold, may be paid for the land without the burial ground being liable for income tax, on what it pays for purchase of the land.

IV. It is an approved form of organizing cemetery associations in Pennsylvania to have parties not stockholders participate in proceeds of burial rights, see *Taylor v. Eden Cemetery Co.*, 337 Pa. 203, and the complained of decision refuses recognition to such a form of organization.

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BRIEF.

(a)

FOREWORD.

In this brief, and in the stipulation of facts, many references will be made to the trust under the resolution of November 21, 1881, and certificates issued thereunder and to shareholders in that trust.

Petitioner desires to make its position clear that it is not in any way presenting an argument in relation to the taxability of the shareholders in the trust.

The liability of such shareholders has nothing whatsoever to do with the exemption claimed by the petitioner herein.

Whether the petitioner is exempt, or not, the liability of shareholders for tax will and does depend on the time when the shareholders acquired shares, the cost, the sums received, and applicable laws and rules relating to their separate and distinct individual situations.

(b)

UPON THE FIRST QUESTION PRESENTED, SUBDIVISION (a), (p. III HEREOF).

The petitioner is owned and operated exclusively for the benefit of its members who are burial right owners.

Under the facts stipulated, and Statutes Involved (pp. XIV of this petition, 1(a) and *Commissioner v. Kensico Cemetery*, 96 Fed. (2) 594 (1938) 2 Cir. at p. 596, the petitioner is exempt.

The following matters of fact relate to the above italicised proposition:

Concerning the type of organization (and this may overlap the Argument, on the sub-division of the questions involved, p. 12, and p. 18 hereof), it is to be observed that:

The petitioner is a corporation of very limited powers, created at a time and under Acts of Assembly of the State of Pennsylvania, when the present day minute details of corporate set-up were not thought of, all prior to the present Pennsylvania constitution of 1874.

By Pennsylvania *Act of* 6 *April*, 1791 (3 *Smith's Laws* 20) the Supreme Court of Pennsylvania (the highest Court in the State) was given the right to create corporations for literary, charitable, and religious purposes; by the *Pennsylvania Act of* 8 *April*, 1833, (*P. L.* 1833, p. 238) the prior Act was made applicable to beneficial societies and associations, and fire engine and hose companies; and by the *Act of* 20 *February*, 1854, (*P. L.* 1854, p. 90) the said Acts were extended to include cemetery or burial associations, as well as societies for the detection of thieves and recovery of stolen property, and for promotion of science and agriculture; and by the *Pennsylvania Acts of* 13 *October*, 1840, *P. L.* 1841, p. 5) and 26 *March*, 1867 (*P. L.* 1867, pp. 40, 44) the power to create said corporations was extended to the

Court of Common Pleas, the usual county Court of the first instance.

It was under the authority of these Acts, in 1869 that the petitioner was created, by the Court of Common Pleas of Montgomery County. (See Charter, Stipulation Par. 3, Ap. 27a, Exhibit No. 2, Ap. 46a.)

It is a cemetery association, under the Acts referred to above. The charter is its "birth certificate." *C. F. Castle &c.*, 342 Pa. 60 &c.

That charter was not affected by the subsequently adopted Pennsylvania Constitution of 1874, *See Hays v. Com.*, 82 Pa. 518, *Williamsport R. R. Co. v. Williamsport,* 120 Pa. 1.

In the Court proceeding, see: Exhibit 2 of the Stipulation (Ap. 49a) the applicants are stated to be "associated" for the purpose of establishing a cemetery.

That charter in Art. I gives the "association" its title, that of the petitioner (Ap. 49a).

Art. II gives the right to acquire the land, &c., to hold for cemetery purposes (Ap. 49a).

Art. III provides for Managers and their duties. There is in this a reference to "stockholders" electing the Managers (Ap. 50a). That quoted word meant the "associates" or "incorporators".

There is no provision in the charter for capital, capital stock, shares of stock, nor anything suggesting stock, except the one isolated word stockholders, who are to elect Managers.

The fact that upon its organization in 1869, the applicants for charter proceeded *ultra vires* to create an erroneous set-up under the charter, did not change the character of the corporation, so as to deprive the purchasers of burial rights from, at any time, asserting all the rights they had in a cemetery association, under Pennsylvania law, (*Cooke v. Marshall,* 191 Pa. 315 (1899)) nor did that erroneous method of organization subsist after 1881; and more particularly, that erroneous organization did not exist at the time

the Internal Revenue Laws of the Federal Government taxing incomes first went into effect on March 1, 1913.

It is enough to say that the incorporators of the cemetery association, which was the petitioner, after the promotion and organization, and operation from 1869 to 1881, found themselves under the erroneous organization in this position:

They could only receive dividends, earned as profits, on the erroneously issued capital stock, and as a cemetery association only could earn the dividends while there were burial rights to be sold, and this source of income was bound to decline, and end, and there was no way for final recovery of principal invested by them.

There was facing them several solutions to remedy the illegal effect they had created:

First, they could follow what was an old established Pennsylvania practice of putting the land comprising the cemetery in trust, and have the proceeds of burial rights arbitrarily divided amongst the original contributors to the project, and the cemetery association; or Second, they might create a mortgage to be released, pro tanto, as each burial right in a lot was sold; or Third, in effect, follow the New York manner of doing such business, and have such arbitrary division of such proceeds of sales of burial rights paid directly by the corporation to shareholders on the obligation to repay the original contributors.

However, as is apparent from the facts stipulated, the persons in interest as improper stockholders, but as contributors to the corporation of the cemetery premises, rejected the plan for an arbitrary payment to them of a certain share, percentage or part of proceeds of sales of burial rights, but put themselves in the position where, partly on the principle of the Pennsylvania trust system, and somewhat like the mortgage plan, they placed the interest of the burial right owners, first, and said, in word and deed, they should be paid, as consideration for the cemetery lands, directly or indirectly, contributed to the corporation, after

some, but not all, of the expenses of operation of the cemetery for burial right owners were paid (See Exhibit No. 6 of Stipulation, Ap. 60a) viz., I, Contribution to Permanent Fund, income of which was to be used for preservation of the cemetery in good order and repair, II, Contribution to current repair, and proper care and improvement of the cemetery premises, III, Contribution not exceeding ten per cent. to a Contingent Fund, for purchase of additional land, or other useful and necessary purposes incident to said cemetery, from burial right proceeds only, the balance which is "the consideration for the conveyance of the premises to said company for the aforesaid purposes."

It is to be noted that the agreement, trust or contract of 1881, last abstracted above, does not cover all the transactions of the cemetery, for example, the payment of the cost of merchandise, supplies, and labor in and about the conduct and operations of the cemetery (items (a) to (j) Ap. p. 33a) are not to be deducted before the consideration of, or for, the land is paid out. Nor are the items of receipt, from other cemetery activities (items (c) to (j) Ap. p. 32a,) to be applied to payment to shareholders for the premises, but the income or receipts from the sales of burial rights alone, not required for the first three purposes, was to be paid as consideration for the premises to the trust shareholders.

Specifically, see Stipulation, Par. 14 (Ap. 32a) the sources of income of petitioner (either as trustee under the trust of 1881, or as a corporation) are listed, lettered (a) to (j), and of these ten, the shareholders in the trust of 1881 participated in only two items, viz.,

> "(a) The sale of burial rights in lots in the cemetery,
>
> "(b) Resale of burial rights in lots in the cemetery, which had heretofore been sold, and repurchased."

In none of the other eight items of source of income do the trust shareholders have any participation, direct or indirect.

Again by the stipulation, Par. 15 (Ap. 33a) the disbursements are fifteen, and the two items of receipt in which the shareholders are to participate are subject to deduction of only:

> "(k) Current repair, care and improvement of the cemetery;
>
> (l) Additions and extensions to buildings, culverts, lots and cemetery improvements;
>
> (m) Payments to a trust as an addition to the principal of a permanent fund, income of which was to be applied to the preservation of the cemetery in good order and repair;
>
> (n) Payments to a trust of a Contingent Fund set aside for the purchase of additional land and for other uses and necessary purposes incident to the cemetery pursuant to the resolution of November 21, 1881."

These items compare with the trust provision, Stipulation (Ap. 60a).

Therefore the holders of the trust certificates participate in two items of gross income, and after four items of disbursements, are deducted.

In eight items of income and ten items of disbursements, the trust shareholders have no right, title, interest, share or participation. These items consist of the elements of cemetery operation.

Moreover, the payment of the consideration of and for the cemetery premises is a part of the expense, of the cemetery management, just as the price of any merchandise or property acquired for re-sale is a cost of operation of a business.

Shareholders are to be paid regardless of whether petitioner earns a profit or not.

This creation of the relationship under the trust of 1881 was clearly a proper legal matter under Pennsylvania law, as will be argued later here (See p. 29 of this brief).

The most apt analogy to the situation of the petitioner as to whether it was operated for the burial right owners, or the original contributors, is: If there existed patents on devices, which it was desired to make, and sell, and the persons interested agreed to put up a sum of money to form a corporation to acquire the patents, and manufacture the devices; and out of the money subscribed the patents were purchased and put in the name of one contributor, but paid for out of the fund contributed; and the corporation was formed and it received the patents (by an assignment reciting as consideration therefor the part of the contribution paid for it) and the other cash; and the corporation issued capital stock for the patents and cash; and after a few years the parties agreed that the stock should be surrendered and cancelled and in lieu thereof certain restricted receipts of the company, but not all, subject to certain deductions, but not all of expenses, of the company should be paid to the former stockholders, in shares equivalent to stock formerly held, as royalty, in payment of consideration of the patents; and the royalties ended with the life of the patents; could it be said the manufacturing company was owned and operated for the benefit of the participants in royalties?

In the ordinary businessman's conception, the situation is that the petitioner, for the land (as substituted consideration in place of that originally given and surrendered and cancelled) agreed to pay a royalty contingent in amount for the cemetery premises.

Such royalty, when paid, is a deductible item of expense, secured by an equitable lien, enforceable in the Courts.

To further illustrate the situation, if the land was acquired and conveyed, for the purpose of mining ore, or digging clay, and after the incidental transactions, the participation was, in like manner, a royalty, payable from sales of

ore or clay, the payments would be payment of an obligation of the company, as a debtor.

In none of these illustrations would the payment of participations be of profits or earnings of the corporation, or justify the conclusion the land was owned and operated for the participants in royalties.

So that, March 1, 1913, and when the statutes applicable particularly to this case were constitutionally approved and authorized, the petitioner was:

A Pennsylvania cemetery association, created under the laws above stated, in which the benefits of the operations were for the burial right owners who constituted the members of the corporation.

This met the first requirement of the statute and entitled the petitioner to exemption, because the statute does not require all the elements of that section of the law to be met by each corporation seeking exemption. The elements for exemption are disjunctive (*See Comm. of I. R. v. Kensico Cemetery*, 96 F. (ad) (*Second Circuit*) p. 594, at 596).

The important words importing exemption are, in this first instance, which, I (a) (as noted in lefthand column) in Petition, "Statutes Involved" at p. xiv, are those relating to "ownership" and "operation".

The petitioner *owns* the cemetery, and no one else does, particularly, the shareholders in the trust do not participate in *ownership*. Long after the shareholders cease to have an interest under the trust, the ownership will stand as it is today, without any mesne conveyance or change in title or ownership. If the shareholders have an equitable lien, on the land, that lien does not give them ownership.

The operations are solely conducted for burial right owners. There is in the operations of the petitioner's cemetery, no operation for the benefit of any interest except the whole cemetery, and that is for its membership, its burial right owners.

Do others get money from the operations? Yes, they do, but the conduct of operations is not for their benefit, under

the law, i. e., the wage and salary workers and employees profit by their receipt of money, and in like form do the suppliers of the equipment, shovels, picks, grass cutters, road machines, trucks, and tractors, and those furnishing materials, sand, cement, bricks, plants, seeds, trees, and under the trust of 1881 the supplier of the lands, the cemetery premises.

The words in *Commissioner v. Kensico Cemetery*, 96 Fed. (2d) 594 at p. 596, are apt:

> "The land purchase agreements involved herein do not contain any evidence of an interest in the net earnings of the cemetery but of an indebtedness altogether independent of the question of 'net earnings'. By these agreements, the land share holders have no direct interest in the business. The certificates can 'only be regarded as certificates of indebtedness, entitled to the application, at periodic intervals, of one-half of the proceeds of future sales of lots' and they are 'promises to pay money, differing essentially from certificates of stock which a stock corporation issues.' American Exchange Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107, 110; Gregory v. Chapman, 119 Md. 495, 87 A. 323.
>
> "The respondent is a membership corporation, that is to say, not a stock corporation nor one organized for pecuniary profit. It exists in accordance with legislation designed to meet a public purpose. Its revenues, derived from the sale of burial plots and incidental services, are directed in their entirety to the payment of debts incurred in the acquisition of burial grounds and in the maintenance and improvement of the cemetery for the public end for which the corporation was organized."

The attempt to distinguish the Kensico case in the Opinion of the Circuit Court, sought to be reviewed at this Court,

is superficial and is not sound, as fundamentally the situation in that case and in petitioner's is the same, viz., payment for land used as a cemetery from sales of burial rights does not create an operation of the cemetery for the participants in the sums paid for the land, but the cemetery is still *owned* and *operated* for the burial right owners.

The principle of the statute should prevail.

Upon this one phase of the law and the facts, the petitioner's motion for summary judgment should have prevailed.

There should be no difficulty in applicability of this first element of exemption, because of some strained meaning of the word being given to the word "members" in the statute.

The designation of who are the members of the petitioner should, under the facts, be clear. The true members are the "burial right owners" and no other persons.

The fact is stated that the burial right owners did not directly exercise any voice in the management of the general affairs of the cemetery (Ap. 34a). No fact exists that the burial right owners are without right or authority to exercise directly any voice in the management of the cemetery. Corporators or stockholders under the trust of 1881 are required to be lot holders (Ap. 62a), who are not holders of trust certificates.

The Managers are the fiduciary representatives of those burial right owners and act as members or their representatives. This is put in force in the by-laws (Ap. 157a and 160a).

It is merely common sense to understand that purchasers of burial rights die, and that their right of sepulture in a piece of land or lot cannot be sold, when a body has been interred, and is not a distributable part of a decedent's estate, and that the participation of each lot, as well as all such lots, so held, is entitled to have the cemetery maintained, preserved, and cared for as an entirety, in perpetuity, and hence is entitled to representation in the corporation, and the by-laws so provide (Ap. 164a) for repre-

sentative membership, and by the trust of 1881, only "some one from among the lot-holders in said cemetery" is eligible to succeed a corporator.

The prevailing opinion in the District Court was that of Moore, J., (Ap. 183a), (44 F. Supp. 63), adopted by Bard, J., (Ap. 192a), in the judgment he entered and later opened, and likewise adopted by Kalodner, J. (Ap. 194a).

That controlling opinion recites some of the facts (Ap. 183a to 189a), then quotes the statute, then refers to the case of Smith v. Commissioner, 69 F. (2) 911, C. C. A. 3, (1933), which will be commented upon separately hereafter (see pp. 31, 32 this brief). The District Judge below states what the test is in that Court, then attempts to distinguish the case of Commissioner v. Kensico Cem. Co., 96 F. (2) 594 (C. C. A. 2-1938).

The part of the opinion of the District Court for consideration at this point is the "test" statement.

The opinion says: "The test in this Court is whether the shareholders or trustees, or both combined, carry on business for profit" (Ap. 190a).

The opinion ignores that part of the statute creating one class of exemption, here argued, of "Cemetery companies owned and operated exclusively for the benefit of their members" (Quoted in this petition at p. xiv and in the opinion of the District Court, Ap. 189a).

Particularly the District Court recites no facts stipulated, and finds no law applicable, which deprives the petitioner of the statutory exemption.

The test is *not* under the statute: "Is a profit made?" See *Trinidad v. Sagrada*, 263, U. S. 578, 68 L. Ed. 488.

Except by the general conclusion (included without disclosure or comment) if at all, the point here argued has not been decided in the District Court.

The petitioner's motions for judgment (Ap. 25a) are not directly refused, but only indirectly by allowing defendant's motions.

(c)

UPON THE FIRST QUESTION PRESENTED SUBDIVISION (b) (p. III HEREOF).

The petitioner is not a corporation operated for profit.

Under the statute II (p. xiv this petition) and the case of *Com. v. Kensico Cem.*, 96 Fed. (2) 594 at p. 596, and *Trinidad v. Sagrada*, 263 U. S. 578, this alone entitles the petitioner to its exemption.

The operations of the petitioner are set forth in the stipulation at Par. 14 (Ap. 32a), Par. 15 (Ap. 33a), Par. 17 (Ap. 34a).

There is no stipulation of any facts indicating the petitioner does anything which a cemetery association is not legally and morally entitled to do.

There is no profit in the sense that term is used in the statute.

There is no net earning or excess over costs of operation which is payable to, nor for the benefit of, nor which can be claimed by anyone, from the petitioner's operations.

Any sum in excess of what the cost of operation may be is found only in the investment of, or in, or for the cemetery, and the cemetery property, and belongs to the past, present, and future burial right owners in lots, because the entire operation is for their use and benefit.

The provision of the statute does not mean that in order to benefit by its terms that a cemetery company must at all times operate so that, I, its income and outgo equally balance, or II, that its income is less than its outgo, and hence operates at a loss, and that, III, never must its income exceed its outgo. See: *Trinidad v. Sagrada*, 263 U. S. 578, 68 L. Ed. 458.

Under the first provision argued under (p. 2 of this Brief) if there is a profit, it is for the benefit of the whole

cemetery, hence it is for the benefit of the *bona fide* lot holders.

The Commissioner of Internal Revenue in his *Regulations* 103, issued and distributed as late as 1941, at p. 232, Sec. 19, 101 (5)—1, makes an interesting ruling, and similar regulations appeared from *Reg.* 69, art. 516, on:

He rules a cemetery company which issues preferred stock, entitling the owners thereof to dividends at a fixed rate, not exceeding the legal rate of interest in the State of incorporation, or eight per cent., whichever is greater, may be exempt, provided the preferred stock shall be retired as soon as sufficient funds are available therefor, realized from sales, and that all funds not required for dividends or for retirement of the stock are used for the care and improvement of the cemetery.

This is cited at this point to indicate that a profit, although earned and paid to stockholders, does not take a cemetery company out of the exempt class.

The only item of petitioner's business in this connection requiring comment, and applicable to the years in question, is the status of the payments to the shareholders, under the trust of November, 1881. Such payments do go out of a specified part of the cemetery receipts, and after going out are never again for use in the cemetery affairs.

The payments so made, generally, in these late years are or are not, a profit to the shareholders, depending on the acquisition cost to them respectively. (See *Commissioner v. Kensico Cem.*, 96 Fed. Rep. (2) 594, at p. 596, middle of second column). The payments are not out of an earned profit of petitioner, but petitioner must pay, even though all its business results in a deficit.

That does not make the operation of the cemetery one for profit.

Payment under the New York plan of a definite fixed percentage of the proceeds of sales of burial rights does not constitute operation for profit (*Commissioner v. Kensico Cem., supra*).

Payment of dividends and principal to preferred stockholders does not indicate operation for profit (see *Regulations* 103 *cited above*).

Payment of a release charge in reduction of a mortgage liability would not, on like reasoning, create operation for profit.

Payment for the raw material, land, on any determinate basis, does not imply or evidence operation for profit.

Even though the divisible income from sales of burial rights is accelerated in amount by improvements, this does not convert the operations of the cemetery into those for profit (See *Commissioner v. Kensico, supra*).

At bar, by agreement of the parties, in the creation of the trust of 1881, the payments to the shareholders in the trust are consideration for the conveyance of the cemetery premises (Ap. 62a).

When the payment to the shareholders under the trust of 1881 is allocated to the proper place in which it belongs, it is not payment of a profit by the petitioner, it is, on the contrary, a cost or an expense or an added investment in cemetery premises, which must be deducted before a profit is to be ascertained.

Any excess, of income, over expenditures, by petitioner, including in the latter the payments to the shareholders, if showing a profit, does not create a situation where operations are for a profit, because all such increment is used solely for the cemetery and no individual has any right or interest in or to the same. (See: *Trinidad v. Sagrada, supra*).

That incidental benefit going into cemetery investment, creating better value and better prices, is an element justifying the exemption provided for in the law (see *Com. v. Kensico Cem., supra*).

The fact the petitioner gets income is immaterial, to the exemption claim, so long as it does not engage in any activity except a cemetery company, and things incidental

thereto. See: *Trinidad v. Sagrada &c.*, 263 U. S. 578, 68 L. Ed. 458.

In the prevailing opinion of the District Court (Ap. 183a) the only matter possibly under the statute involved referred to influencing the conclusion reached is the expression: "The test in this Court is whether the shareholders or trustees, or both combined, carry on business for profit" (Ap. 190a) citing two cases, which have been distinguished at p. 30, et seq. of this brief.

This basis is error because under the statute there are three tests, (1) Whether the petitioner is owned or operated exclusively for the benefit of its members, and (2) (referred to below), and (3) chartered as a cemetery company, not engaged in any other business, and no part of the net earnings of which inures to individuals (statute this petition p. xiv, opinion Ap. 189a). These are alternative, and disjunctive and not cumulative.

The District Court maybe had in mind the (2) a cemetery company "not operated for profit", but changes the expression to "carry on business for a profit"; as suggested before, this means under the statute, not that the petitioner, in order to enjoy exemption, must operate at a loss, or forever break even on income and outgo.

That a non-profit company under like statutory provision may make a profit, and still not lose its exemption is indicated by the *Sagrada case*.

The opinion of the Circuit Court treats this matter of operation for profit in a peculiar way.

In arriving at its conclusion the Court apparently passes over the fact that what may have been done before 1881 is entirely wiped out, and is irrelevant and immaterial, but that what was done after 1881 is under the trust of 1881. The stipulated facts do not justify the assertion in the opinion that from 1875 to 1931 a distribution was made on $50. par value stock. On the contrary the stipulation supports that statement only to say that from 1869 to 1881 petitioner was operated as a trading or business corporation, and paid

dividends on stock, but after 1881 a part of the proceeds of sales of burial rights was paid under the trust of 1881, a consideration for the cemetery premises. The operation of the cemetery did not after 1881 create any fund which was paid to the shareholders. Selling burial rights is not cemetery operation. It is only the beginning of a perpetual duty to maintain the sanctity of the resting place of the bodies put in the cemetery ground. The citation of money figures in the opinion is entirely apart from the issue of "ownership" and "operation".

The principle of the statute, as well as any other law, is not found nor supported by comment on the amount of money involved in a transaction. Judge Jones' statement on this point in conclusion, "But, if it has earnings and desires to maintain an exemption status, it must use all such income exclusively for the promotion and maintenance of the cemetery purposes for which it was created", is a clear statement of the principle, hence the added conclusion, "Manifestly the instant taxpayer has not done that" is without support. The stipulated facts do show that at any time since 1881 the "earnings" and "all such income" was "used" for cemetery purposes. This, of course, means payment for the land is included.

There is in the statute involved here in this second independent qualification for exemption, the implicit criterion, of whether the paramount purpose was to operate a cemetery in order to make a distributable profit. The petitioner here has, in fact, shown by its conduct for years that there was no paramount or primary purpose to do more than operate the cemetery as a perpetual place for burying the dead, maintained to the highest degree of contemporary standards for that purpose, hence its investment from its earnings, in the property, which have grown to a vast sum, none of which can by any method sanctioned by law ever become the property of any individuals, particularly shareholders in the trust of 1881. That, incidental to operations, a profit is made by someone who supplied real estate, mer-

chandise, appliances, material, labor or science, does not make petitioner a cemetery company one operated for profit.

Specifically the payment from the standpoint of the petitioner, to shareholders in the trust of 1881, is a payment for land, by petitioner, and inasmuch as that fact is agreed to under the terms of the trust, by petitioner and shareholders, it is a fixed fact.

There is nothing, in the law applicable to the tax in question, which confers on Collector, Commissioner, or a Court, the jurisdictional power to set aside a fact, like that here referred to, which has existed unquestioned since 1881.

There is no legal authority conferred on the Court, under facts, as stipulated here, to say, in effect, true, the petitioner assumed an obligation, and agreed to pay it, but we reverse the fact, and hold that payment is a profit distribution. Particularly as shareholders are to be paid regardless of whether the cemetery on the whole earns a profit or suffers a loss.

In the opinion below in reference to any of the elements of, or concerning, exemption, no attempt has been made to indicate that the facts stipulated support the finding made.

(d)

UPON THE FIRST QUESTION PRESENTED SUBDIVISION (c) (p. III HEREOF).

The petitioner is chartered solely for burial purposes, as a cemetery corporation, and is not permitted by its charter to engage in any business not necessarily incident to that purpose, and no part of its net earnings inures to the benefit of any private shareholder nor individual.

This is the third separate qualification entitling a cemetery company to exemption (see Statutes Involved, this petition p. xiv, and *Comm. v. Kensico Cem.*, 96 Fed. (2) 594 &c.).

The petitioner comes within this definition, beyond any question. The first two elements of this third disjunctive qualification for exemption are made out by the Charter of petitioner (Ap. 46a).

A reference to its charter (Exhibit No. 2 of the Stipulation Ap. 46a) shows it is an association incorporated to hold property for burial purposes, and there is nothing in the charter permitting petitioner to engage in any business not necessarily incident to that purpose. See: *C. F. Castle &c.* 342 Pa. 60.

In fact, the petitioner never did anything but acquire land, for burial purposes and develop it, and has done nothing not necessarily incidental to that purpose.

It has taken that raw material—land—and has by improvement and embellishment, solely for the use and benefit of the burial right owners, created a very valuable cemetery investment.

Everything it did was necessarily involved in conduct of a cemetery of the class to which it belonged, situate adjacent to a large city, creating by investment and reinvestment of its income, a place, not merely a burying ground,

or graveyard, but a distinct highest class improvement of this kind and character.

It has endeavored to provide for the future perpetual preservation of the cemetery premises. (Ap. 61a-62a).

Operation for profit means, under the statute, profit applicable to other than cemetery uses.

If this be not so, any religious, educational, charitable, or hospital organization, which collected more income gross, than it had to expend in current operations, would be operated for profit, although the excess was used for the purpose of the organization, and although no part of that excess was withdrawn. See: *Trinidad v. Sagrada*, 263 U. S. 578, 68 L. Ed. 458.

No part of the net earnings inures to the benefit of any private shareholder or individual.

Apparently from the record in this case, the payments to the shareholders under the trust of 1881 have been viewed by the Commissioner of Internal Revenue as violative of this element of the third type of exemption.

This effort does not have any basis in fact.

When the petitioner was promoted prior to incorporation in 1869, it appears by the Stipulation (Ap. p. 27a and Ap. 38a, Exhibit No. 1) that certain persons apparently agreed to become associated as parties, and that their funds were used to acquire the cemetery premises and that the premises were to be conveyed to the petitioner after its creation (Ap. 28a, Exhibit 4, Ap. 53a) and that capital stock was issued for the premises and cash contributed (Ap. 27a-28a and 38a to 60a) and the premises were improved for cemetery purposes.

Then in 1881, beyond the recollection of any one now personally familiar with the situation, these facts appear:

See: Exhibit No. 6, Stipulation (Ap. 60a) in the whereas clause to the resolution of 1881, and these then current facts are in nowise contradicted:

> "The purchase money of the lands, tenements and premises conveyed to The West Laurel Hill Cemetery

> Co., and the monies required for the necessary improvements of the same to adapt the same to the purposes of a cemetery or place of interment for the dead, have been advanced and contributed in certain proportions by certain persons who associated themselves together for that purpose, and who in order conveniently to effect the same, caused the conveyance of said premises to be made to the said company, which agreed to hold the same IN TRUST for the uses and intents for which said monies were advanced, that is to say, for the uses and trusts hereby declared."

The above is an uncontradicted corporate business record, having the support of its age and adherence to it for over sixty years, and as well the *Act of Congress*, 20 June, 1936, C 641, 49 Stat. 156, U. S. C. A. Title 28, Sec. 695.

In other words based on the facts, as they knew them, and agreed were the facts, the parties then in interest in 1881 made a contract, cancelling all that had been done before in acquiring the cemetery premises and improving it, and founded on those facts, made a new contract, putting into force the preliminary agreement and called it the "trust of 1881."

Whether the theory be admitted that the original stock issue was illegal, or whether that legal conclusion is contested, and whether the full trust idea is discarded or not, it must be conceded that, over thirty years before the income tax laws first came into being, for a good consideration, money value, to the petitioner company, viz., the surrender and cancellation of $112,500., of partly paid capital stock, which left the cemetery premises unpaid for, the petitioner agreed to pay "the consideration for the conveyance of the premises to the company for the aforesaid purposes" which were the uses and trusts therein declared, and which were those to which the petitioner originally agreed, but which had not been adhered to in the irregular set-up of organization.

The trust of 1881 did not provide for payment of any "net earnings" to its shareholders, nor any profits.

It did provide for an "indebtedness", of the business of the petitioner, being paid.

That trust provided for the operations of the cemetery exclusively for the burial rights owners (1) by providing for the Permanent Fund, (2) for the current repairs and proper care and improvement of the cemetery premises, (3) for a Contingent Fund for purchase of more land, or other useful and necessary purposes of the cemetery, and (4) to pay the "net" left after that "from time to time received from the said sales" (which are burial right sales) to the contributors, which is "the consideration for the conveyance of said premises to the said Company," and this was payable whether the general business activities resulted in a loss, or not.

The petitioner had to have land to create lots, in which to sell burial rights, and that land was its stock in trade or its raw material, which it was to manufacture or manipulate into a finished, improved product, and it was to pay by the trust of 1881 for that raw material.

By no conception of the facts, or law, can such payment be part of the net earnings of petitioner.

Net earnings could only be ascertained after that obligation for land was paid. (Compare *American National Co. v. United States,* 274 U. S. 99, 47 S. C. 520, 71 L. Ed. 946.) Moreover, net earnings could only be ascertained after the income and expenses required to meet the doing of all business, incidental to the operation of the cemetery, had been fixed in amount, not only sales of burial rights.

Particularly the shareholders in the trust had an equitable lien, which did not participate in the other income, net or gross, or profits, if any, of the cemetery business, but, they were confined to the proceeds of sales of burial rights, after deducting the three items for general cemetery benefit, named in the trust, "from time to time received from said sales" of burial rights.

That the purpose and specific agreement of the parties was to exclude the shareholders in the trust from cemetery income other than sales of burial rights, it is so provided (See Stipulation, Exhibit No. 6, Ap. 62a) and no right in any other fund or income contributes to that payment, because when it comes to payment of the consideration for conveyance of the cemetery premises, none of the monies "from any other uses of said cemetery premises" are included, and it is solely from "said sales", which are burial right sales only, that that consideration is payable.

The petitioner, while contending the payments to shareholders is an indebtedness for raw material, which it embellishes and improves into a salable product, is not unmindful of the fact that in accounting such payments may be called expenses or investments, or by some other name to suit the notions of a particular accountant.

This will be commented on,—with this preliminary observation, any such allocation does not result in any net income being paid to shareholders or individuals:

Such allocation may be upon this reasoning:

When and if under the trust of 1881 a payment is made to shareholders thereunder, such payment is for the acquisition of land, its consideration, by the terms of the trust, and is not a true expense, because something is acquired or a liability decreased.

If that attitude is taken, we have the situation that such payment, whether taxable income to the shareholders or not, is a capital investment of petitioner, and if this be so, then the petitioner reinvested from 1881 to 1912 an additional $753,000. (See Stipulation, Exhibit No. 7b Ap. 67a) and from 1913 to 1931 reinvested an additional $1,263,000. (See Stipulation, Exhibit No. 7b Ap. 68a), in the cemetery premises.

Now, if this type of accounting be adopted, we have most clearly the fact that no net profits nor net earnings were ever paid to the shareholders under the trust of 1881.

The Commissioner of Internal Revenue by his Regula-

tions has defined net income, and it conforms to the decided cases.

The definition he gives is:

"Net income, meaning gross income less statutory deductions, the statutory deductions are in general", though not exclusively expenditures, other than capital expenditures, connected with the production of income. (*Regulations* 74 Art. 41 and on down through to *Regulations* 103, Sec. 19.101 (5)-1 which are under the Revenue Acts of 1928 to date.)

An examination of the numerous accounts attached to the Stipulation shows that to produce income the petitioner expended certain sums, and the income (gross) less these expenditures created the net income (or loss). The payment to the shareholders was either an "expenditure" deductible or a "capital expenditure" but in no event was it "net income" to petitioner as defined, in the exemption provisions of statutes involved.

These shareholders had an economic interest in the property, similar to that held—not the property of the taxpayer—in *Thomas vs. Perkins,* 301 U. S. 655, 57 S. Ct. 911, 81 L. Ed. 1324, and *Holly Dev. Co. v. Commissioner,* 93 F. (2) 146.

The prevailing opinion in the District Court, Moore, J., in an allied case, adopted by the other acting judges, makes no comment at all upon the third qualification for exemption. It can only be considered as decided, in the decision, because the judgment for defendant is comprehensive enough to embrace all questions, whether mentioned or not.

The opinion in the District Court (Ap. 191a) in attempting to distinguish the Kensico Cemetery case, has in it one glaring error (see 8th line from bottom of the page) where the expression "and payment of expenses" is referred to as being done before shareholders are paid. That this fact is error is demonstrated by the references to stipulation in the brief (this Brief pp. 5, 6) and which are not repeated here. Likewise in the first sentence of the same paragraph (Ap. p. 191a) the Court states but a partial fact and should

have added after "the plaintiff paid the entire consideration for the purchase of the original boundary of the land" the words "by issuance of capital stock" and go on "when the deed was delivered to it in 1869," and then add these words "and the capital stock was in 1881 surrendered and cancelled, and shares in the trust of 1881 substituted in the place and stead of that first consideration given for the land."

The Circuit Court in its opinion on this third element for exemption simply arrives at its conclusion by putting aside the fact that a radical change had been made in 1881, and concludes there was "no change whatever". That there was such change has been commented on, the stipulated facts show a change was made. Particularly there is no basis for the Court's finding that payments under the trust of 1881 have come from "the commingled surplus earnings of the" petitioner "after payment of all operational expenses," &c. There is no stipulated fact to show payments were ever made out of anything beyond the restricted source of sales of burial rights, under the trust of 1881. The Court relied on facts and conclusions not in the record.

Generally, under all three qualifications for exemption, under the statutes, the petitioner has qualified, and the judgment below should be reversed.

(e)

UPON THE FIRST QUESTION PRESENTED GENERALLY:

The foregoing brief upon the statutes in question, concerning exemption, is made, without any waiver on the petitioner's part of the fact that the trust of 1881 is an effective and enforceable trust, but it is presented as meeting the Commissioner's contentions, wherein he ignored the trust as an independent creation, and treated all the transactions of the petitioner on one basis.

The petitioner, of course, contends that the business of the sale of burial rights has been, insofar as the proceeds are concerned, such that the petitioner, as trustee, not as a corporation in its own right, operates as follows:

I. Primarily there is a trusteeship to receive and disburse proceeds of sales of burial rights.

II. Under that trusteeship, when disbursement is made, a new trusteeship arises, viz., trusteeship of the Permanent Fund.

III. The petitioner as a corporation operating the business of a cemetery is a beneficiary of the proceeds of sales of burial rights from the original trust for current repairs and proper care and improvement of the cemetery premises, and as well, if deemed expedient, a contingent fund for purchase of additional land, which is again a subsidiary trust.

IV. The shareholders of the original trust are beneficiaries of the balance remaining from this one source only, proceeds of burial rights, as payment to them of considera-

tion for the land. This created an equitable lien (see this brief p. 29).

This situation creates no different situation from that argued heretofore (specifically on separate elements of exemption at p. 2 hereof, p. 12 hereof, and p. 18 hereof).

This situation, under the Revenue Laws, creates an obligation on the trustee to file a fiduciary return, showing receipts and disbursements, and persons who are beneficiaries. This has been done.

The corporation in its own right should not be required to file any Federal Tax returns, as it is exempt.

The items referred to above have no proper place in the books of the corporation as such, except the items paid to the corporation out of the trust, under III above.

The trust should not be ignored, and treated as if nonexistent, which the Commissioner of Internal Revenue does.

Essentially, the petitioner herein is like the *Kensico Cemetery*, 96 F. (2) 594 (2 Cir.) and *Forest Lawn Memorial Park Assn.*, 45 B T A No. 168.

Under the Trust of 1881, the proceeds of sales of burial rights, in gross, do not belong to the petitioner, in its corporate right, but after administration under the trust, it gets in its own right, a payment for current repairs and proper care and improvement of the cemetery (not all its expenses nor classes of outgo) and possibly a payment for its benefit, if deemed expedient, a fund to buy additional land, or other useful or necessary purposes incidental to the cemetery. That is, of course, part of the cemetery's the corporation's, income.

But, the permanent fund and payments to shareholders are in fact never income of the petitioner and should not be included in the gross income. (Compare, *Moore vs. Commissioner*, 124 F. (2) 991; *American National Co. vs. U. S.*, 274 U. S. 99, 47 S. C. 520, 71 L. Ed. 946.)

(f)

UPON THE SECOND QUESTION PRESENTED (p. III HEREOF).

There are a number of questions or issues which may seem to have a bearing on the issue whether the petitioner is in one of the classes which are exempt. These are now commented upon.

I.

ESTOPPEL.

There is no matter of estoppel applicable to either party to this litigation, that is to say:

If the petitioner taxpayer satisfies the elements required for exemption, it is not estopped, because it made returns and paid taxes in prior years, from claiming in these later years in question, its full statutory rights of exemption.

In like manner, if the Internal Revenue Bureau took a certain position at one time, it is not estopped from changing that attitude in the later years.

This view of the law is so stated without citation of authority because, (1) it is fundamental, and (2) there is no element applicable to the existing claims in suit, i. e., bar of a statute, which would make it unfair or unjust to have petitioner's statutory rights applied in full.

The petitioner petitioned for exemption, paid under protest and claimed refund, of each of the sums involved in the instant cases (see pleadings) and moreover, always asserted its exemption, in proper procedure (Ap. 34a).

The defendant presented no claim by pleading or argument that petitioner was estopped to claim its exemption.

II.

STATUS OF THE TRUST OF 1881.

The status of the trust under the resolution of 1881 is not that of an association, classed by Internal Revenue Laws as a corporation, requiring it as a trustee to pay income taxes. It must, of course, legally make fiduciary returns.

The trust conducts no business as trustee.

The trust is merely to receive and disburse funds, and is essentially and basically created in order to pay certain items for the cemetery's benefit out of certain funds, one of which is used to discharge, pro tanto, the equitable lien creditors (shareholders in the trust) have against the proceeds of sales of burial rights, due for payment for the land.

The principles announced in the case of *A. A. Lewis Co. v. Commissioner*, 301 U. S. 385, 81 L. Ed. 1174, 578 Ct. 799, are applicable, and have not been overruled. (See, also, *United States v. Davidson*, 115 F. (2) 799; *Commissioner v. Gibbs, &c.*, 117 F. (2) 619.) The various regulations issued by the Commissioner of Internal Revenue, during a long period of years, defining, conformably to Court decisions, the characteristics of the taxable trusts, exclude the petitioner trustee from that category.

The petitioner as trustee for all of the years here in question filed its fiduciary return showing the receipt of the proceeds of burial rights, and their allocation to the trust purposes. (Stipulation, Exhibit No. 41, Ap. 151a; Exhibit 42, Ap. 152a.)

These exhibits are not printed in full in the appendix, but only described, as their only function, in detail, is to show figures, no matter of principle or application of law.

Inasmuch as the trustee had no business dealings and/or transactions except to receive and disburse money, without

profit, it owed no tax as trustee under Internal Revenue Laws.

The beneficiaries of the trust, payments to whom were fully disclosed, were or were not subject to income taxes, according to their different situations.

The trustee under the trust of 1881, far from being an association conducting a business, is so far removed from that class, being merely a receiver and disburser of a special fund, that it could not deduct any expense of doing business. See *Higgins v. Commissioner,* 312 U. S. 212, 85 L. Ed. 524.

The obligations of the trustee under the trust of 1881 are such that the shareholders could, in a Court of competent jurisdiction, enforce the trust, whether the relationship of the parties was any one of the many enforceable types of trust, or not; in any event, on the ground the trust was an enforceable contract. The trust created an express executory contract in writing whereby the parties indicate an intention to make a particular property (part of the proceeds of burial rights) described therein, security for a debt or other obligation, and hence creates an equitable lien on the funds so indicated. See: *Sundheim v. Phila. School Dist.,* 311 Pa. 90 (103) (1933); *Hurley v. Ashbridge,* 55 Pa. Superior Ct. 523, (1914); *First Nat. Bank, &c. vs. Bangor Trust Co.,* 297 Pa. 115 (1929).

A burial right owner could in equity enforce the trust to contribute to the Permanent Fund, by virtue of the terms of the trust, the terms of the deed for the burial right, and the statutory requirements of the State of Pennsylvania.

Similarly, the burial right owners could in equity enforce the trust to "apply" proceeds of burial rights (in addition to income from other uses of the Cemetery so used) "to the current repair, and proper care and improvement of the premises" and not exceeding ten percent for the formation of the Contingent Fund "for purchase of additional land or other useful or necessary purposes incident to the Cemetery."

The shareholders could in proper proceedings have judicial supervision of the application of the proceeds of sales of burial rights to the purposes last mentioned in the trust resolution of 1881, if it was found that the said proceeds were being used for other purposes than that defined in the trust. For example, they could force an examination of the books. See: *Taylor v. Eden Cemetery Co.*, 337 Pa. 203.

Moreover, if the cemetery should be abolished, say by condemnation proceedings, for a public use, the proceeds, so acquired therefor, would be used to replace the burial right owners' rights, with newly acquired places of burial, and shareholders under the trust would have no interest therein.

If further sales of burial rights were stopped by law, i. e. as a health measure, the shareholders would have no further participation of any kind.

In either instance their equitable lien would expire.

Such trust activities as exist could not be called doing a business under such circumstances.

III.

CASES CITED BY COURT BELOW.

Moore, J., in the opinion adopted in the District Court (Ap. 190a) refers to the case of *Little Four Oil Company v. Lewellyn*, 35 F. (2) 149 (C. C. A. 3-1929) in his comment about the test being whether business was carried on for a profit.

The case cited was that of trust created "for the purpose of buying and selling real estate and mining and drilling for oil and gas thereon" and the description of its activities takes half a page to recite (p. 151) and it did all that business, and the question at issue was whether the trust was taxable as of a corporation.

It is difficult to find anything of significance in that case,

applicable at bar, or to a cemetery.

Here, we have the trust of 1881, which receives money from one source, which it does not own, and pays out to certain specified purposes, and which makes no contracts, does no business, neither buys nor sells, but only receives and disburses.

The opinion in the cited case is given over to showing that the trust there conducted business, much more extensive than receiving and disbursing.

The Big Four trustees handled principal and income, two classes of receipts, invested and reinvested, while the trustee at bar handled only one class of receipts, and never held title to or invested in anything.

There was no payment of an equitable lien or obligation on one property, as a primary reason for the trust's existence.

There was no issue of a specific statutory exemption in that case.

The cited case is under different law and radically different facts.

In like manner the case of *Willis v. Commissioner,* 58 F. (2) 121, (C. C. A. 9-1932) is readily distinguishable. The joint owners of real estate finding it apparently unwise to handle the same as joint owners, created a trust to handle that real estate as well as any other property acquired from time to time. In fact, the trust dealt in real estate, handled principal and income. It was like the Big Four in substance a corporation, in form a trust, and it conducted a business.

At bar the trust of 1881 is in the class found in *the Lewis case,* supra, where the trustee as such had far more duty and control than at bar.

The opinion in the District Court (Ap. p. 190a) relies on the case of *May Kimball Smith v. Commissioner,* 69 F. (2) 911, 3 Cir., but it is not apt nor pertinent. Judge Moore (Ap. 190a) concedes the different situation in facts and law and then waives them aside (Ap. 190a).

It is true the opinion of the Court states the matters stated in the opinion in the District Court.

It is also true that the points relied on by Judge Moore were *obiter dicta.*

It is likewise true that all of the facts as stipulated in this case were not before the Court.

The questions involved in that case and argued were:

(a) The jurisdiction of the Board of Tax Appeals, to ignore and set aside contractual and fiduciary relations of many years standing.

(b) Were there any facts to support the Board's decision.

(c) Whether a trustee can destroy the rights of a cestui que trust by its form of making tax returns.

(d) The taxable status of the payments under the trust of 1881, to an individual receiving the same.

The petitioner and the government in that case did not argue anything about the issues of exemption of petitioner under the statutes; there was no argument nor issue presented there about the *ultra vires* issue of capital stock, nor the charter restrictions of the petitioner; petitioner was not a party and its interests were not involved, considered, nor protected. What Judge Davis wrote, as relied on here, was not relevant in fact, nor correct in law, to the petitioner's tax liability. The confusion evident is indicated by this: Under the law, corporations (unless exempt) must file tax returns and pay tax, and certain trusts, associations, &c., are to be considered as corporations. It is absurd to think of this in connection with Judge Davis' opinion, i. e., he says, "The questions here are whether or not the Cemetery Company is an association within the meaning of the term

'corporation' " when we have the established fact here stipulated that petitioner is a corporation. The *dicta* continue throughout. Such unnecessary findings in that opinion are only applicable to that case—if at all—not other cases *New Eng. M. L. I. Co. v. Mitchell*, 118 F. (2) 414.

The good faith of the government in citing this case as decisive of a point at issue here, and not at issue there, may be found in this:

> "In 1929" (says Judge Davis) "the taxable year involved here, the company received the following income: $277,558. for burial rights, of which the value on March 1, 1913, was $150,698.04."

Does the government mean to contend that because, forsooth, May Kimball Smith was required to pay income tax on a sum paid her by the petitioner, trustee under the trust of 1881, and "Payment on the certificate may or may not constitute net earnings to its holder, depending on the cost of the security to him" (*Commissioner v. Kensico*, 96 F. (2) 594, at p. 596) that it follows: (1) petitioner is taxable as an association because the Court said so, while it is in truth a corporation, and (2) the March 1, 1913, value of burial rights was a sum stated, neither of which matters were in issue, or relevant. It would seem consistent that both the *obiter* conclusions are out. The Government does not concede the March 1, 1913, value to be what Judge Davis said it was.

The Smith case, going off on a tangent, totally unexpected by the parties to it, is of no value, under other statutory provisions, applied to a different kind of party, on facts differing singularly from those at bar.

The Circuit Court's comments on that Smith case are not in point, and do not indicate a similarity of issues, principles applicable, parties, law or facts.

IV.

METHODS OF BOOKKEEPING.

The method or way books are kept does not operate to create, nor eliminate, tax liability.

It is conceded, of course, that under the Internal Revenue Laws, books must be kept, and these books must be accurate, in the sense that they must truthfully record what has taken place.

However, no form, style, or particular system of bookkeeping is required.

If, from or by the books the data can be acquired to allocate the items where they legally belong, under the income tax laws, the books are sufficient.

Mingling two classes of business, as was done by petitioner, for a while, prior to 1935, does not rob the trustee's functions under the trust of 1881 of their significance, or change their category.

Likewise, the books concerning operations cannot in anywise alter or change the true character of the business transactions from that character, no matter what names are used or how the accounts are allocated.

The significant fact is that from 1913 down to this time the Commissioner has not in anywise attacked the petitioner's method of bookkeeping, either prior to 1935, when all accounts, trustees under the trust of 1881, and corporate affairs were in one set of books, nor since, when they were put in separate books.

There is no fact applicable to the matter of exemption which is proved or disproved by the bookkeeping methods of the petitioner.

The method of contending against exemption adopted by the Commissioner is briefly that the payment to shareholders under the trust of 1881 shall be regarded as "net

earnings" from operations, and hence the operation is not for the benefit of the cemetery or burial right owners.

That stand is not supported by the books, and it is not contradicted by the books, but on the contrary the books only evidence what was done, but under no circumstances change the fact that pursuant to certain fixed rights, certain payments were made, no matter by what name the same are called.

It would be trite to cite authority that—

Books are to be kept;

Such books, if not satisfactory to the Commissioner, may be directed to be changed and kept in other forms, but no such direction was given;

Errors in allocation of items bind neither the taxpayer nor the Commissioner;

Tax liability depends on the facts, not upon a bookkeeper's method of recording such facts.

The Bureau of Internal Revenue or Commissioner seems to stress the fact that for some years the petitioner kept the trust books and trust funds under the trust of 1881, mingled. There is no complaint that funds are not identified nor capable of segregation, from the books.

In *Jones v. Norris*, 122 F. (2) 6, 10 Cir., the question was whether or not income under a deed of trust was taxable to the grantor. It appears (p. 8, 2nd column) the trust deed was not recorded; the grantor maintained control as if he were the trustee; the grantor individually leased trust property, for convenience; but he kept strict books of account, showing what was due the trust; and grantor mingled the trust funds in his own account. The Commissioner relied on these facts, inter alia, to justify disregard of the trust. Held, notwithstanding these facts, the trust was a valid, recognizable one.

In *Commissioner v. Alamitos Land Co.*, 112 F. (2) 648, 9 Cir., we find an apt analogy to the case at bar. There the taxpayer received a payment of a judgment, which judgment was subject to an appeal, and put the payment in a

special trust account, and later was, on reversal of the judgment, required to pay that back, with interest. The Court held that the method of entry in the books did not change the status of the payment.

V.

CHARACTER OF PAYMENTS TO SHAREHOLDERS IN THE TRUST.

The payments since the year 1881 by the trustee under the trust of that year are not "dividends".

The payments are out of a specific fund, from a specific restricted source, subject to only certain deductions of payments limited in purpose and class (Ap. 60a, et seq.).

The payments to shareholders are in discharge of the "consideration for the conveyance of the cemetery premises" secured by the equitable lien created by the trust of 1881 on the proceeds of burial rights (Ap. 62a).

At the instance of defendants much has been made of amounts and names used in the distribution of proceeds of sales of burial rights; these are matters purely to create atmosphere, but they do not bear upon the elements applicable to determination of exemption under the statutes.

The nomenclature used by the petitioner's managers, or officers, or the Commissioner, does not determine the issue, nor fix the nature, of the payments made to the shareholders. Calling such payments dividends did not make them so. The qualities and properties of the thing define and make it. The name applied is no part of the thing itself. See: *Inland Dev. Co. v. Commissioner*, 120 F. (2) 986, 10 Cir.

VI.

RECEIPTS OF INCOME BY PETITIONER.

The receipts of income by the petitioner does not affect its right to exemption under the statutes involved.

See:

Trinidad v. Sagrada, &c., 263 U. S. 578, 68 L. Ed. 456;
Koon Kreek Klub v. Thomas, 108 F. (2) 616;
Commissioner v. Battle Creek, 126 F. (2) 405;
U. S. v. Proprietors, &c., 102 F. (2) 481;
Commissioner v. Chicago Graphic Arts, 128 F. (2) 425.

Under the law a Permanent Fund for perpetual care of a cemetery is not taxable for income tax purposes.

In order to be consistent, and if the petitioner is to be treated as a commercial, business, or trading corporation, such a fund would be a corporate asset, an addition to the surplus, and the receipt of the sum for Permanent Fund would be income, and the placing of it in the Permanent Fund would be a non-deductible item.

The fact that the Permanent Fund for good order and repair is separate from corporate assets, recognized the principle contended for by petitioner, that it could properly create a trust, the distributable income from which would be returned to it for some purposes.

If it could do so for good order and repair, why, under the law, could it not do so "to pay the consideration for conveyance of the corporate premises"? That is all it has done in the trust of 1881.

In principle the situation is like that in *Central Life &c. v. Commissioner*, 51 F. (2) 939.

In that case a capital stock life insurance company was

taken over by a mutual life insurance company, and provision was made for the assumption of liability on non-participating policies, and any surplus of the earnings in that non-participating business was to be paid to the stockholders of the original company. The business of the non-participating insurance was conducted as a department of the mutual company. The mutual company was taxed on the distributions to stockholders of the original company.

It was held, however, that such funds were not income to the mutual company, and not taxable.

So the payments to the shareholders in the trust of 1881 are not income to the petitioner. The beneficial ownership of the sums paid to the shareholders was not in the petitioner, and the same were not income to it. (See, *Moore v. Commissioner*, 124 F. (2) 991.)

VII.

CANCELLATION OF CAPITAL STOCK.

Under the trust of 1881, the original consideration for the conveyance of the cemetery premises, the capital stock erroneously issued, was cancelled, in 1881 (Stipulation, Par. 7-8, Ap. 28a-29a, and Exhibit No. 6, Ap. 63a).

The cancellation of that consideration and substitution of the shares in the trust for that surrender of capital stock was, when made, a complete contract, for a then present valuable consideration, creating an obligation for payment for the cemetery premises, differing only from that in *Commissioner v. Kensico Cemetery Co.*, supra, in one respect, as in that case holders of certificates evidencing the indebtedness were prior in right to the interest of the burial right owners, while at bar the burial right owners are primarily taken care of before holders of certificates are considered.

When the capital stock was surrendered and cancelled, it

was eliminated for all purposes. See: *Hammans v. Commissioner*, 121 F. (2) p. 4.

It is to be noted that the elimination of the capital stock occurred in 1881, and was not a tax evasion procedure.

That elimination of stock terminated private ownership in the cemetery, apart from burial right owners.

The fact that certificate holders were given a vote in selection of managers does not alter their status as mere holders of an obligation.

Under the Regulations, cited *supra*, p. 13 hereof preferred stock would not prevent the exemption being proper. A preferred stock would give a vote to the stockholders.

A preferred stock would be different in substance from that of certificate holders found under the trust, because the latter could not participate in general income, of petitioner, but only in residue of proceeds of burial rights.

Therefore, the certificates under the trust of 1881 do not create any situation destroying elements applicable to exemption.

It was irregular to issue stock in 1869,—the charter as the "birth certificate" of the petitioner did not permit that. See: *C. F. Castle, &c.*, 342 Pa. 60; *Cooke v. Marshall*, 191 Pa. 315. That, however, was cured in 1881.

The cancellation of the illegally issued capital stock was complete, effective, and adhered to for the period since 1881, to date, and the shareholders in the trust were not stockholders.

VIII.

CHARACTER OF PETITIONER'S BUSINESS.

The character of the business conducted by the petitioner was that of conducting a burial ground and the matters necessarily incident to that, and it did not go into nor conduct any other different, or outside, or ultra vires acts.

The things the petitioner did in conduct of its business are stipulated (see pars. 14 to 17, Ap. 32a to 34a) and in this connection the petitioner only argues concerning things done after 1913, because that period is the only one affecting Federal income tax matters; although it may be as well said the same principles are applicable since 1881.

The thing petitioner did was to acquire land for burial purposes, pay for it, and use it for that purpose.

What may be gathered from the accounts which are exhibits to the Stipulation?

No one of the things done was apart from corporate powers, and every thing done was incidental and required to conduct a modern cemetery.

Neither in pleading nor in stipulation has the Bureau of Internal Revenue ever contended the plaintiff did an *ultra vires* act, nor that it conducted an activity of an extra-legal character.

There is no claim, as petitioner understands it, except that the payments to shareholders in the trust, in some indefinite way, made the petitioner a business or commercial activity, not entitled to the statutory exemption.

IX.

ULTRA VIRES ISSUE OF STOCK.

In Pennsylvania, the issuance of stock by a corporation, whose charter does not call for capital, capital stock and stockholders, is illegal.

In *Cooke v. Marshall*, 191 Pa. 315, the plaintiff claimed to be the secretary and treasurer of a cemetery company, elected by stockholders, and defendant held the books and seal of the corporation as secretary and treasurer. The company was organized by Act of Assembly, and the charter provided for no capital, but capital was issued, and

twice increased. The plaintiff prevailed below, but the Supreme Court, reversing the Common Pleas, held the stock issue *ultra vires* and void.

In like manner shares issued for participation in sales of cemetery lots, where the shareholders are given a vote, were held not to give stockholders rights, although they did give a right to examine books. See: *Taylor v. Eden Cemetery*, 337 Pa. 203.

X.

OBJECTIONS TO RELEVANCY OF CERTAIN STIPULATED FACTS.

Necessarily in preparing a stipulation of the type used in this case, there must be included facts which some parties demand, but which may be deemed irrelevant, and immaterial.

The petitioner therefore pursuant to that part of the stipulation reserving objections to some of the facts in the stipulation, objects, as it did, on argument in the District Court, and as well in the Circuit Court, as follows:

The petitioner concedes the relevancy and materiality of the facts which:

I. Indicate the ownership and for whose benefit the cemetery is operated;

II. Indicate the corporation petitioner is or is not operated for distributable profit;

III. (a) Indicate what the charter permits, (b) and what is done with "net earnings".

Aside from these matters, everything in the stipulation is irrelevant and immaterial.

Therefore:

Par. 1, (Ap. 27a) of the stipulation is objected to, immaterial, and irrelevant. What promotors did or hoped to do can have no bearing on the issue at bar. All these matters were merged in the charter when granted, were readjusted in November, 1881, and had ceased to exist in force or effect, at any time since 1913.

Par. 2, (Ap. 27a) of the stipulation, is objected to as immaterial and irrelevant. The method of making book entries is immaterial. What was put in books in 1869, prior to incorporation, can give no basis for fact of the elements referred to in the Revenue statutes involved. Moreover, these entries ceased to have force and effect after November, 1881, and particularly did not mean anything after 1913.

Par. 3, (Ap. 27a) of the stipulation. The proceedings for incorporation are, of course, relevant. They refer to elements stated in the statutes involved.

Par. 4, (Ap. 28a) of the stipulation, is objected to as irrelevant and immaterial. If the incorporators in 1869 did something legal or illegal, which had ceased to exist, in the form they did, over thirty years before income tax laws were passed, that is of no factual force in the issue under the statutes since 1913.

Par. 5, (Ap. 28a) of the stipulation, is possibly relevant and material, insofar as a deed of cemetery premises is concerned.

That portion of this paragraph and Exhibit 5, (Ap. 28a) concerning minutes, is immaterial and irrelevant, relating to anything except the deed in question (which defendant required be printed in full) which is Exhibit No. 4 (Ap. 53a) inasmuch as all such matters and facts passed out of

existence in 1881, more than thirty years before an income tax law was effective.

Par. 6 (Ap. 28a) may be interesting but is innocuous, and is not seriously objected to, but, in fact, every element of the exemption under the law may exist whether the petitioner grew or dried up.

Par. 7 (Ap. 28a) is, of course, relevant and material.

Par. 8 (Ap. 29a) is, of course material. The final statement that petitioner's "capital has not changed since 1881" is a peculiar statement; the words are the defendant's. From petitioner's standpoint, that means this and this only:

In 1869 the petitioner was not authorized to have capital, by its charter; some was, however, illegally created; in 1881 this was wiped out; and that situation has remained since 1881 to this time, viz., petitioner had no capital. However, as appears by the many other exhibits, the investment in cemetery property has vastly increased since 1881.

The quoted expression is of no value nor meaning.

Par. 9, (Ap. 29a). This is likewise objected to as immaterial. If the petitioner paid dividends on illegal stock issued in 1869, that has no bearing on the elements of statutory exemption from taxation in the years in question.

Likewise what name was attached to payments was immaterial.

Payments from 1881 to 1912 to shareholders in the trust of 1881 are likewise immaterial.

The supporting schedules, Exhibits 7a, 7b, and 7c, (Ap. 65a to 68a) are immaterial details of the same general statements referred to above.

Every element of exemption under the statutes involved is present notwithstanding the matters in Par. 9 (Ap. 29a) of the stipulation.

Par. 10 (Ap. 30a). This is objected to as immaterial, except as to the Exhibit 7d, (Ap. 69a-70a) illustrating payments under the trust of 1881.

On the facts, under the law, the methods used by the petitioner to keep its books was immaterial; it could not by its method of keeping books establish or destroy any element set forth in the statute on which exemption is allowable.

This applies as well to the Exhibit 7d, (Ap. 70a) in that it neither created nor destroyed rights.

Par. 11 (Ap. 30a). These are objected to as they do not establish any fact relevant to income tax liability in the years in question.

If, perchance, the arguments contained in the Exhibits 8 to 21 (Ap. 91a to 121a) are true, from the Commissioner's standpoint, at the same time they are based upon book entries and these entries are immaterial.

The paragraph and Exhibits are both of matters and things occurring long before the income tax laws were in existence, and be they what they may, such facts do not establish or destroy the statutory elements of exemption obtaining in the years in question.

If the period was relevant to the present inquiry, petitioner would correctly maintain that these exhibits indicate the petitioner did nothing except conduct a cemetery or burial place and such other matters properly incidental thereto.

Par. 12 (Ap. 31a). The comments as to paragraph 11 are applicable and as well to the Exhibits 22 to 27 (Ap. 121a to 148a) inclusive.

Par. 13 (Ap. 31a). So much thereof as refers to the years 1919 to 1929, inclusive, the comments to Par. 11 are applicable. So much thereof as refers to the years in question

is relevant and material, insofar as they evidence the character of the business conducted by the petitioner.

They do indicate that petitioner did no more than conduct a cemetery.

Par. 14 and Par. 15 (Ap. 32a and 33a). These are, of course, relevant as indicating what petitioner did.

There is not stated, however, the division of the activities into those under the trust of 1881 and those in the corporate capacity.

Such division shows in the returns for the years 1930 to 1935, inclusive, fiduciary and corporate. (Ap. 149a to 153a) (not printed in full but described)

Par. 16 (Ap. 33a) is of course objected to as immaterial and irrelevant. The comment to Par. 11 is applicable.

Par. 17 (Ap. 34a). This is, of course, relevant, insofar as relates to the elements of exemption under the statutes involved.

Par. 18 (Ap. 34a). This is entirely irrelevant and no rights of parties could be created nor destroyed by any nomenclature adopted by a Board of Managers.

That the certificates for shares in the trust of 1881 were salable and transferable is immaterial, likewise.

Par. 19 (Ap. 35a). May be material to the issue of exemption or no exemption.

Why an error, if any, (Exhibit 47, Ap. 168a) in calculating the Permanent Fund share under the deed and the trust of 1881, prior to 1933, is attempted to be made so much of is not clear. But, be that as it may, for the error, if any, the burial right owners had a remedy at law.

The elements for allowance of exemption are not affected by this matter.

Par. 20 (Ap. 36a). The pamphlet, Exhibit 48, (not printed) may be relevant, as something petitioner did do. It is an advertisement only.

The petitioner finds in it nothing repugnant to any one of the elements of exemption under the statute.

However, by this publication, the petitioner could not dislodge its obligation to pay the shareholders in the trust for the cemetery premises.

Par. 21 (Ap. 36a). It is relevant that petitioner made returns and paid taxes since 1914.

It is also relevant plaintiff always claimed exemption under the law.

The letter of the Commissioner, Exhibit 49, (Ap. 170a), is relevant only as indicating he refused to recognize the exemption. However, this made no law, nor created any facts. It is only evidence of the Commissioner's policy, which he follows in this petitioner's case. He makes no law thereby.

Par. 22 and Par. 23 and Par. 24 (Ap. 37a) are relevant, that the petitioner paid the taxes sued for herein, and claimed a refund which was refused. This is supported by admissions on the pleadings (i.e. complaint, pars. 8-9-10, Ap. 8a, and answer, pars. 8-9-10, Ap. 19a).

The pleadings raise no issue whatsoever about petitioner's payments and claims for refund in all the consolidated cases.

It is also relevant that the suits are timely.

The District Court and the Circuit Court did not pass upon any of these objections, unless it be held that no comment thereon, in effect, dismissed such objections.

The Circuit Court does comment on incompetent, irrelevant and immaterial facts, so objected to, as basis for its conclusion.

(g)

CONCLUSION.

In conclusion petitioner and defendant have raised by their proceedings the question of exemption under the statutes involved, and facts stipulated.

That question because of the stipulation requires no findings of fact, nor interpretation of facts, but application of the statute to the facts, which are fixed and determined.

The law is found in the statutes, and the elements of exemption therein set forth exist in petitioner's case.

The judgment of the Circuit Court should be reviewed by this Court for the purpose of resolving the conflict with the case of *Commissioner v. Kensico*, 96 F. (2) 594 (C.C.A. 2), and *Trinidad v. Sagrada*, 263 U. S. 578, 67 L. Ed. 488, and because the Circuit Court has decided an important question of Federal law which should be settled by the Supreme Court, the conclusion of the Circuit Court overrides and conflicts with approved methods of organization of cemetery companies, under the laws of Pennsylvania. See: *Taylor v. Eden Cemetery*, 337 Pa. 203.

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